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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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COMMISSIONERS

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MIKE GLEASON - Chairman  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
KRISTIN K. MAYES  
GARY PIERCE

2007 DEC 20 A 10: 35

DEC 20 2007

AZ CORP COMMISSION  
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IN THE MATTER OF THE APPLICATION OF  
SEMPRA ENERGY SOLUTIONS LLC FOR A  
CERTIFICATE OF CONVENIENCE AND  
NECESSITY FOR COMPETITIVE RETAIL  
ELECTRIC SERVICE.

DOCKET NO. E-03964A-06-0168

PROCEDURAL ORDER

BY THE COMMISSION:

On March 16, 2006, Sempra Energy Solutions LLC ("Sempra," "SES," or "Company") filed with the Arizona Corporation Commission ("Commission") an application for a Certificate of Convenience and Necessity ("CC&N") to provide competitive retail electric service.

Intervention was granted to Tucson Electric Power Company ("TEP") on April 12, 2006; to Arizona Public Service Company ("APS") on April 26, 2006; to Air Liquide Industrial U.S. LP ("Air Liquide") on June 15, 2006; to the Residential Utility Consumer Office ("RUCO") on April 13, 2007; to the Salt River Project Agricultural and Improvement Project ("SRP") on May 11, 2007;<sup>1</sup> to New West Energy ("New West" or "NWE") on July 31, 2007; and to the Arizona Investment Council ("AIC") on August 15, 2007.

A hearing is set to commence on the application on February 19, 2008. Prefiled testimony has been filed, with further filings due on January 17, 2008, and February 7, 2008. The deadline for discovery is February 11, 2008, and the pre-hearing conference is set for February 11, 2008.

On December 3, 2007, Sempra filed a Motion to Strike Testimony ("Motion").

On December 7, 2007, New West, Air Liquide, RUCO, and the Commission's Utilities Division Staff ("Staff") filed Responses to the Motion.

On December 13, 2007, RUCO filed a Reply to Air Liquide's Response to the Motion.

<sup>1</sup> On August 29, 2007, SRP filed a Notice of Withdrawal of Intervention. By Procedural Order issued September 28, 2007, SRP was granted leave to withdraw its intervention.

1 **SEMPRA'S MOTION TO STRIKE**

2 Sempra moves to strike, in its entirety, the prefiled direct testimony of Stephen Ahearn filed  
3 by RUCO on July 3, 2007; the prefiled direct testimony of Frank G. Graves filed by New West on  
4 August 31, 2007; and the prefiled direct testimony of Peter Fox-Penner filed by New West on August  
5 31, 2007. Sempra requests that its Motion be resolved as soon as practicable, so that the parties know  
6 how to proceed in preparing responsive testimony.

7 Sempra states that it filed its application for a CC&N in conformance with A.R.S. § 40-208.<sup>2</sup>  
8 Sempra acknowledges that A.R.S. § 40-207<sup>3</sup> requires electricity suppliers to obtain a CC&N from the  
9 Commission before offering electricity for sale to retail customers, and states that Sempra has  
10 specifically sought such authority under A.R.S. §§ 40-201 through 40-203, 40-207, and 40-281 *et*  
11 *seq.* and A.A.C. R14-2-202. Sempra asserts that the testimony that it moves to strike expands the  
12 issues in this proceeding beyond those necessary for the Commission to address in its Decision on  
13 Sempra's application and is "so broad and general in nature, as well as in conflict with existing  
14 Arizona law, that its admission conceivably could deprive SES, and perhaps other affected parties, of  
15 due process of law." (Motion at 3.) Sempra claims that "Arizona law already provides for retail  
16 direct access, and thus, the penumbra of issues raised in the NWEA/RUCO testimony are clearly  
17 beyond the scope of SES' application, are irrelevant and should not be made part of the record in this  
18 proceeding." (Motion at 2.) Sempra contends that there are "three core issues" to be resolved in this  
19 proceeding, as follows: (1) whether Sempra satisfies the relevant statutory and regulatory criteria

20 \_\_\_\_\_  
21 <sup>2</sup> A.R.S. § 40-208 provides as follows:

22 After December 31, 2000 service territories established by a certificate of convenience and necessity  
23 shall be open to electric generation service competition for all retail electric customers for any  
24 electricity supplier that obtains a certificate from the commission pursuant to § 40-207 or any public  
25 power entity.

26 <sup>3</sup> A.R.S. § 40-207 provides as follows:

27 A. An electricity supplier shall obtain a certificate from the commission before offering electricity for  
28 sale to retail electric customers in this state.

B. The commission may adopt, amend and repeal rules reasonably necessary to carry out this section.  
On or before December 31, 1998, the commission shall adopt rules providing minimum standards of  
disclosure and complaint procedures applicable to certificated electricity suppliers. The commission  
may impose conditions on the certification of electricity suppliers to assure their financial stability,  
including periodic reports, bonds and deposits.

C. As a condition of obtaining a certificate required under subsection A, an electricity supplier shall  
agree to be subject to the transaction privilege taxes and affiliated excise taxes pursuant to title 42,  
chapter 5 and the provisions of the model city tax code.

1 necessary to be granted a CC&N; (2) the terms and conditions under which a CC&N should be  
2 granted to Sempra, if one is granted; and (3) whether the Commission has before it the information  
3 necessary under the requirements of *Phelps Dodge Corp. v. Ariz. Elec. Power Group*, 207 Ariz. 95,  
4 83 P.3d 573 (App. 2004) ("*Phelps Dodge*"). (Motion at 1.)

5 Sempra is of the opinion that the New West and RUCO prefiled testimony "would divert the  
6 issues in this proceeding to address (i) whether retail direct access is good for Arizona as a matter of  
7 public policy, (ii) the broad design of a retail choice program, including the design of default  
8 Standard Offer Service, (iii) customer price risk, (iv) recovery of stranded generation costs by  
9 incumbent utilities, (v) expanded regulatory oversight, and (vi) a survey of experiences to date with  
10 direct access in the United States." (Motion at 3.) Sempra argues that the provision of Standard  
11 Offer Service and recovery of stranded generation costs have already been provided for in prior  
12 Commission decisions; that the Arizona legislature has opened Arizona to retail choice; that the  
13 Commission has already had experience in evaluating the qualifications of energy service providers  
14 ("ESPs") such as Sempra; and that there is neither a requirement nor a need to revisit those issues in  
15 order to grant Sempra a CC&N. (Motion at 3-4.)

16 Sempra asserts that New West and RUCO will not be prejudiced by the granting of Sempra's  
17 Motion because they will have an opportunity to file "appropriate rebuttal testimony" in accord with  
18 the current procedural schedule in this matter.

19 **Sempra's Argument Regarding New West Witness Graves' Direct Testimony**

20 Sempra objects to the Graves testimony's reference to "Arizona's readiness to reinstitute  
21 retail electric competition," arguing that the testimony assumes "that direct access has been canceled  
22 in Arizona." (Motion at 4.) Sempra also objects to the Graves testimony regarding New West's  
23 position that the Commission should address five issues prior to ruling on Sempra's application.  
24 Sempra's Motion briefly addresses each of the five issues and argues that the Graves testimony does  
25 not appear to consider to the fact that the Commission conducted a rulemaking on retail electric  
26 competition, and does not refer to any changed circumstances or other condition that might  
27 necessitate the Commission's revisiting the issues or modifying the rules relating to retail choice.  
28 Sempra argues that the testimony does not relate to Sempra's application at all, but instead constitutes

1 an “invitation for the Commission to open an entirely new broad-based rulemaking to consider the  
 2 choice *ab initio*.” (Motion at 5.) Sempra believes that competing expert projections of market  
 3 impacts and market conditions are no substitute for real life experience, that the Commission will be  
 4 in a stronger position to evaluate market effects of retail choice once there are actually certificated  
 5 ESPs doing business in Arizona, (Motion at 5-6), and that there is no reason for the Commission to  
 6 undertake a rulemaking at this time in order to develop new criteria governing the granting of  
 7 CC&Ns for ESPs, (Motion at 7).

#### 8 **Sempra’s Argument Regarding New West Witness Fox-Penner’s Direct Testimony**

9 Sempra asserts that the Fox-Penner testimony does not address Sempra’s proposed rates or the  
 10 fair value of Sempra’s assets, but is instead generic, in the nature of an academic work summarizing  
 11 Dr. Fox-Penner’s prior publications. While not taking a position on the Fox-Penner testimony,  
 12 Sempra argues that it should be stricken because the issues discussed therein are irrelevant to  
 13 Sempra’s application and outside the scope of this proceeding.

#### 14 **Sempra’s Argument Regarding RUCO Witness Ahearn’s Direct Testimony**

15 Sempra argues that the Ahearn testimony, like the testimony of the New West witnesses,  
 16 raises issues that are unnecessary to the consideration of Sempra’s application and are beyond the  
 17 scope of the application. Sempra objects to the public policy perspective of the Ahearn testimony  
 18 and argues that it is the public policy of the State of Arizona, as expressed by the Legislature, that “a  
 19 competitive market shall exist in the sale of electric generation service.” (Motion at 8, citing A.R.S.  
 20 § 40-202(B).) Sempra contends that the Ahearn testimony “raises issues that are beyond the  
 21 Commission’s jurisdiction and authority to rescind as a matter of law and public policy.” (Motion at  
 22 8.)

#### 23 **AIR LIQUIDE’S RESPONSE TO THE MOTION**

24 Air Liquide supports Sempra’s Motion and agrees with Sempra’s characterization of the  
 25 issues to be decided in this proceeding. Air Liquide argues that “this proceeding should not be used  
 26 by opponents to debate or relitigate the merits of retail electric competition.” (Air Liquide Response  
 27 at 6.) Air Liquide believes that “in order to reverse the state policy favoring the state of retail electric  
 28 competition at this juncture,” New West and RUCO “must affect both legislative and regulatory

1 change due to the overlapping jurisdiction of the state Legislature and Commission over electricity  
2 and competition.” (Air Liquide Response at 2.) Air Liquide points out that Commission Decision  
3 No. 65154 (September 10, 2002) (“Track A Order”) directed the Commission’s Utilities Division  
4 Staff to form an Electric Competition Advisory Group (“ECAG”) and that Decision No. 68485  
5 (February 23, 2006) stated that the Arizona Independent Scheduling Administrator (“AISA”)   
6 “currently provides the important public benefit of keeping the possibility of retail access available to  
7 Arizona at a minimal cost, by providing potential competitors with the necessary assurance that they  
8 will have fair and equitable access to transmission until an RTO is formed and approved by FERC to  
9 take over that function.” (Air Liquide Response at 5, citing Decision No. 68485 at 15.) Air Liquide  
10 argues that New West’s and RUCO’s prefiled Direct Testimony represent “an unlawful collateral  
11 attack on Decision No. 68485.” (Air Liquide Response at 5.)

12 **NEW WEST’S RESPONSE TO SEMPRA’S MOTION**

13 New West believes that the testimony that Sempra requests to have stricken demonstrates that  
14 granting Sempra a CC&N at this time is not in the public interest, and requests that Sempra’s Motion  
15 be denied. (New West Response at 5-7.) New West asserts that the issues raised in the testimony in  
16 question must be considered due to the public interest determination necessary in a CC&N  
17 proceeding. (New West Response at 1-2, citing *Pacific Greyhound Lines v. Sun Valley Bus Lines,*  
18 *Inc.*, 70 Ariz. 65, 72, 216 P.2d 404, 409 (1950) (CC&Ns can only be acquired from the Commission  
19 upon affirmative showing that issuance would best serve the public interest).) New West contends  
20 that the testimony in question is relevant, as the Commission must consider the public interest  
21 implications of its decision in granting CC&Ns, (New West Response at 2-3, citing A.R.S. § 40-  
22 282(C) and *Arizona Corp. Comm’n v. Woods*, 171 Ariz. 286, 830 P.2d 807 (1992)), and that the  
23 public interest is the controlling consideration in a CC&N proceeding, (*Id.*, citing *James P. Paul*  
24 *Water Co. v. Arizona Corp. Comm’n*, 137 Ariz. 426, 429, 671 P.2d 404, 407 (1983); *Arizona Corp.*  
25 *Comm’n v. Tucson Ins. and Bonding Agency*, 3 Ariz. App. 458, 463, 415 P.2d 472, 477 (1966); *Davis*  
26 *v. Corp. Comm’n*, 96 Ariz. 215, 218, 393 P.2d 909, 911 (1964); and *Pueblo Del Sol Water Co. v.*  
27 *Arizona Corp. Comm’n*, 160 Ariz. 285, 286, 772 P.2d 1138, 1139 (App. 1988)(Commission should  
28

1 examine all available evidence to determine whether CC&N is detrimental to the public interest)).

2 New West argues that consideration of the public interest is particularly appropriate in this  
3 case, asserting that “Sempra’s application is a request that the Commission reinstitute retail electric  
4 competition in Arizona. . . . The structure for competition that was envisioned in Arizona and  
5 elsewhere during the 1990s has been proven to be a recipe for failure. Fortunately for Arizona, the  
6 Commission in the early 2000’s reversed course and Arizona has operated quite successfully since.”  
7 (New West Response at 3.) New West states that Sempra has filed the instant application prior to  
8 completion of the comprehensive review of all Electric Competition Rules that the Track A Order  
9 stated was necessary and before Commission review of rules and policies in the wake of *Phelps*  
10 *Dodge*. (New West Response at 3.) New West argues that this fact makes the policy areas addressed  
11 by the testimony in question relevant, material, and particularly appropriate to the Commission’s  
12 public interest determination in this case. (New West Response at 3-4.)

13 New West disagrees with Sempra’s assertion that A.R.S. §§ 40-207 and 40-208 have  
14 preempted the Commission’s public interest determination regarding retail direct access. New West  
15 believes that the Commission is “not foreclosed by the provisions of Title 40 in considering the broad  
16 public interest implications of this Application.” (New West Response at 5.) New West argues that  
17 the amendments to Title 40 were added well after the Commission first adopted its Retail Electric  
18 Competition Rules and that the purpose of the legislation was to confirm existing Commission  
19 authority and to fill any gaps in existing Commission authority. (New West Response at 4, citing  
20 A.R.S. § 40-202(B) and (C).) New West argues that it would be consistent with the legislation for  
21 the Commission to decide that the comprehensive review of all Electric Competition Rules, as  
22 contemplated by the Track A Order, should be completed prior to consideration of Sempra’s  
23 application. (New West Response at 5.)

#### 24 **RUCO’S RESPONSE TO SEMPRA’S MOTION**

25 RUCO argues that Sempra’s Motion is based on an erroneous assumption that the question of  
26 the public interest is beyond the scope of this case and requests that the testimony not be stricken.  
27 (RUCO Response at 4.) RUCO argues that Sempra’s characterization of the “three core issues” to be  
28

1 decided in this proceeding overlooks the fact that the public interest is also a necessary element of the  
 2 Commission's analysis in this proceeding. (RUCO Response at 2.) In addition, RUCO argues that  
 3 the public interest issue was raised in testimony that Sempra has not moved to strike,<sup>4</sup> and that to  
 4 deny RUCO the opportunity to respond to that testimony would infringe on RUCO's due process  
 5 rights as a party to this proceeding. (RUCO Response at 2.)

6 In response to Sempra's argument that A.R.S. § 40-202 preempts the Commission from  
 7 making a public interest determination to grant Sempra a CC&N, RUCO also argues that it is the  
 8 Commission, not the Legislature, that has the authority to set utility rates and to establish the  
 9 appropriate market structure for utilities. (RUCO Response at 4, citing Ariz. Constitution, Art. XV,  
 10 Sec. 3; *State of Arizona v. Tucson Gas*, 15 Ariz. 294, 307, 138 P.781, 786 (1914); and *Phelps Dodge*,  
 11 207 Ariz. 95, 109, 83 P.3d 573, 587 (App. 2004)).

#### 12 **RUCO'S REPLY TO AIR LIQUIDE'S RESPONSE TO SEMPRA'S MOTION**

13 RUCO filed a Reply to Air Liquide's Response in order to address Air Liquide's argument  
 14 that the testimony Sempra wishes to have stricken constitutes an unlawful collateral attack on  
 15 Decision Nos. 65154 and 68485. RUCO argues that neither the Track A Order nor Decision No.  
 16 68485 evaluated the desirability of retail electric competition, and that Air Liquide provides no legal  
 17 authority for its claim that it would be unlawful for the Commission to examine, in this proceeding,  
 18 the desirability of retail electric competition. (RUCO Reply at 2.) RUCO asserts that, while parties  
 19 to the Track A Order may have raised issues related to retail electric competition, the Track A Order  
 20 did not address the substance of the matter, but instead deferred the issues for resolution at a later  
 21 time. (RUCO Reply at 3.) Regarding Decision No. 68485, RUCO argues that the question in that  
 22 proceeding was not whether retail electric competition was in the public interest, but whether Arizona  
 23 utilities should be permitted to continue funding the AISA, and that the issue of the merits of retail  
 24 electric competition was not raised in that proceeding. (RUCO Reply at 3.) RUCO argues that  
 25 nothing about the Track A Order or Decision No. 68485 precludes the Commission from considering  
 26

27 <sup>4</sup> RUCO refers to the prefiled Direct Testimony of Bing Young on behalf of Staff and the prefiled Direct Testimony of  
 28 Kevin Higgins on behalf of Air Liquide. RUCO also expects that testimony to be filed on behalf of Staff in the near  
 future will address public interest issues, based on the request for proposals ("RFP") that Staff issued seeking consulting  
 services in relation to this proceeding. (RUCO Response at 3, referring to the RFP attached to RUCO's Response.)

1 the question of whether retail electric competition is in the public interest, and the implications  
2 thereof on Sempra's application, and that those Decisions do not create a basis for striking testimony  
3 as requested in the Motion.

4 **STAFF'S RESPONSE TO SEMPRA'S MOTION**

5 Staff disagrees with Sempra's argument that the testimony in question expands the issues  
6 raised and does not address the core issues presented by this proceeding. (Staff Response at 1.) Staff  
7 states that while it may not necessarily agree with all of the positions taken in the testimony, Staff  
8 opposes the Motion based on Staff's belief that the testimony that Sempra requests to have stricken  
9 provides information that may be helpful to the Commission. Staff contends that Sempra's  
10 arguments go more to the weight to be given to the testimony than to its admissibility. Staff states  
11 that issues regarding retail electric competition continue to persist and that *Phelps Dodge* has set  
12 aside some of the Commission's electric competition rules. Staff believes that these facts make it  
13 difficult to conclude that the testimony in question is likely to be irrelevant to the Commission in its  
14 consideration of Sempra's application. (Staff Response at 1.)

15 **ANALYSIS**

16 Sempra, in defining the "three core issues" that it wishes the Commission to address,  
17 concedes that the Commission must determine whether Sempra satisfies "the relevant statutory and  
18 regulatory criteria" that would warrant granting it a CC&N. The remainder of the Motion appears to  
19 gloss over the Commission's duty to consider a central facet of the "regulatory criteria" necessary to  
20 its determination on CC&N applications - the public interest. As RUCO noted, the public interest is a  
21 necessary element of the Commission's analysis in this proceeding, and as New West pointed out,  
22 Arizona courts have long recognized the Commission's duty to make a public interest determination  
23 in considering CC&N issues. Far from being "irrelevant," facts pertaining to the public interest in  
24 regard to the grant of a CC&N in this proceeding are very likely to be relevant, material, and  
25 appropriate. The parties may differ in their opinion of whether certain individual facts actually  
26 pertain to the public interest, but at this juncture of the proceeding, it is inappropriate to strike the  
27 entirety of a witness' prefiled testimony simply because its scope exceeds the narrow criteria that an  
28



1 applicant wishes the Commission to consider. As Sempra states in its argument, the Commission, in  
 2 its consideration of Sempra's application under current authorities, is "fully capable of delineating its  
 3 oversight role and both determining and applying the relevant constitutional, statutory and regulatory  
 4 criteria to Sempra." (Motion at 7.) And as Staff states in its Response, issues regarding retail electric  
 5 competition continue to persist, and *Phelps Dodge* has set aside some of the Commission's electric  
 6 competition rules.

7 We disagree with the position taken by Air Liquide in its Response that New West's and  
 8 RUCO's prefiled testimony constitute an unlawful collateral attack on Decision No. 68485. While  
 9 Decision No. 68485 stated that the AISA provided the benefit of keeping the possibility of retail  
 10 access available at a minimal cost, it also noted that the existence of the AISA had not been sufficient  
 11 in itself to assure retail competition and that the AISA was operating in a downsized mode in  
 12 recognition of the lack of retail competition. (Decision No. 68485 at 15.) As RUCO stated in its  
 13 Reply, neither the Track A Order nor Decision No. 68485 provide a basis for striking testimony as  
 14 requested in the Motion.

15 Precluding a party from presenting facts regarding the public interest implications of granting  
 16 a CC&N to an applicant runs counter to the purpose of an administrative proceeding such as this one  
 17 and could deprive the Commission of information helpful to its determination.

18 IT IS THEREFORE ORDERED that the Motion to Strike filed by Sempra Energy Solutions  
 19 LLC on December 3, 2007, is hereby denied.

20 IT IS FURTHER ORDERED that all parties must comply with Rules 31 and 38 of the Rules  
 21 of the Arizona Supreme Court and A.R.S. § 40-243 with respect to practice of law and admission *pro*  
 22 *hac vice*.

23 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113-Unauthorized  
 24 Communications) continues to apply to this proceeding as the matter is now set for public hearing.

25 ...

26 ...

27 ...

28 ...

1 IT IS FURTHER ORDERED that the Presiding Officer may rescind, alter, amend, or waive  
2 any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

3 Dated this 20<sup>th</sup> day of December, 2007.

4  
5   
6 TEENA WOLFE  
7 ADMINISTRATIVE LAW JUDGE  
8

9 Copies of the foregoing mailed/delivered  
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